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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE  
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:  
  
ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

**CLASS COUNSEL'S REPLY  
MEMORANDUM IN SUPPORT OF  
MOTION FOR ATTORNEYS' FEES,  
REIMBURSEMENT OF EXPENSES, AND  
SERVICE AWARDS**

Date: July 9, 2015  
Time: 1:30 pm  
Courtroom: Room 8, 4th Floor  
Judge: Honorable Lucy H. Koh

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1 **I. INTRODUCTION**

2 Out of approximately 64,466 Class Members, three objected to Class Counsel's request  
3 for fees (about .005 percent of the Class, or about one in every 21,489 Class Members), one  
4 objected to Class Counsel's request for Named Plaintiff service awards (about .002 percent of the  
5 Class), and none objected to Class Counsel's request for reimbursement of expenses.  
6 Respectfully, these three Class Member objectors do not raise meritorious concerns. The Court  
7 should overrule their objections and grant Plaintiffs' Motion for Attorneys' Fees, Reimbursement  
8 of Expenses, and Service Awards (Dkt. 1075).

9 **II. ARGUMENT**

10 **A. The Fee Request Meets All Standards for Approval**

11 Class Counsel request attorneys' fees of approximately 19.5 percent of the \$415 million  
12 common fund: \$81,125,000. Under the Ninth Circuit's common fund doctrine, Class Counsel  
13 have an equitable right to be compensated for their successful efforts in creating the common  
14 fund. *Staton v. Boeing Co.*, 327 F.3d 938, 967-68 (9th Cir. 2003). *See also Boeing Co. v. Van*  
15 *Gemert*, 444 U.S. 472, 478 (1980) ("a litigant or a lawyer who recovers a common fund . . . is  
16 entitled to a reasonable attorney's fee from the fund as a whole"); *In re Wash. Pub. Power Supply*  
17 *System Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("WPPSS") (same).

18 The most appropriate way to calculate a reasonable fee where, as here, contingency fee  
19 litigation has produced a common fund, is the percentage-of-the-fund method. *Blum v. Stenson*,  
20 465 U.S. 886, 900 n.16 (1984); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002);  
21 *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (common  
22 fund fee is generally "calculated as a percentage of the recovery"). The percentage method  
23 comports with the legal marketplace in comparable contingency cases, where counsel's fee is  
24 typically based upon a percentage of any recovery. *See Fed. Judicial Ctr., Awarding Attorneys'*  
25 *Fees & Managing Fee Litig.*, at 73 (2005) (percentage method "helps ensure that the fee award  
26 will simulate marketplace rates, since most common fund cases are the kinds of cases normally  
27 taken on a contingency fee basis, by which counsel is promised a percentage of any recovery").  
28 (*See also Fitzpatrick Decl.*, Dkt. 1079, at ¶¶ 3, 8-9 (referencing empirical study where percentage

1 of the fund recovery used as basis for fees in 88% of 688 settlements reviewed).) “Courts in this  
 2 Circuit have held that a ‘benchmark’ of 25% constitutes a reasonable percentage of a common  
 3 fund for purposes of fee calculation.” *Hernandez v. Children’s Creative Learning Ctrs., et al.*,  
 4 Case No. 13-022460-LHK, 2014 U.S. Dist. Lexis 171713, at \*10 (N.D. Cal. Dec. 11, 2014)  
 5 (citing *Vizcaino*, 290 F.3d at 1047; *Six Mexican Workers*, 904 F.2d at 1311; *Paul, Johnson*,  
 6 *Alston & Hunt v. Grawlty*, 886 F.2d 268, 272 (9th Cir. 1989); *Morganstein v. Esber*, 768 F. Supp.  
 7 725, 728 (C.D. Cal. 1991).)

8 This Court has consistently applied the percentage-of-the-fund method to requests for  
 9 attorneys’ fees in common fund cases. *See Barrera, et al. v. The Home Depot U.S.A., Inc.*, Case  
 10 No. 12-CV-5199-LHK, 2015 WL 2437897, at \*1 (N.D. Cal. May 20, 2015) (awarding fee of 25  
 11 percent of common fund); *Hernandez*, 2014 U.S. Dist. Lexis 171713, at \*11 (“at 24.1% of the  
 12 common fund, the requested fee is both below the 25% benchmark and well within the range of  
 13 percentages awarded in similar cases in this Circuit.”) (citing to eight Ninth Circuit cases in  
 14 which the fee awards ranged from 28 percent of the common fund to 33.3 percent); *In re High-*  
 15 *Tech Employee Antitrust Litig.*, Case No. 11-CV-2509-LHK, Dkt. 916 at 5-6 (N.D. Cal. May 16,  
 16 2014) (awarding fee of 25 percent of common fund); *de Mira v. Heartland Employment Serv.*,  
 17 *LLC, et al.*, Case No. 12-CV-4092-LHK, 2014 WL 1026282, at \*4 (N.D. Cal. Mar. 13, 2014)  
 18 (awarding fee of 28 percent of common fund); *Johnson, et al. v. Sky Chefs, Inc.*, Case No. 11-CV-  
 19 5619-LHK, Dkt. 155 (N.D. Cal. Feb. 6, 2014) (awarding fee of 33 percent of the “Maximum  
 20 Settlement Amount”); *Hopkins, et al. v. Stryker Sales Corp., et al.*, Case No. 11-CV-2786-LHK,  
 21 2013 WL 496358, at \*1 and 6 (N.D. Cal. Feb. 6, 2013) (awarding fee of 30 percent of common  
 22 fund, noting that “in most common fund cases, the award exceeds the [25 percent] benchmark,”  
 23 and “nearly all common fund awards range around 30% even after thorough application of either  
 24 the lodestar or twelve-factor method”) (quotations and edit omitted); *Li, et al. v. A Perfect Day*  
 25 *Franchise, Inc., et al.*, Case No. 10-CV-1189-LHK, 2012 U.S. Dist. LEXIS 72781, at \*6 (N.D.  
 26 Cal. May 24, 2012) (awarding fee of 25 percent of settlement fund); *Buccellato, et al. v. AT&T*  
 27 *Operations, Inc.*, Case No. 10-463-LHK, 2011 WL 3348055, at \*1 (N.D. Cal. June 30, 2011)  
 28 (awarding 25 percent of common fund, noting cases in which approved percentage-of-the-fund

1 fee awards resulted in multipliers of over 9).

2 Class Counsel's fee request of approximately 19.5 percent of the common fund is modest  
3 in light of the Ninth Circuit's 25 percent benchmark, and well-supported by the facts of this case.

4 **B. The Objections Regarding the Reasonableness of Class Counsel's Fee Should**  
5 **Be Overruled**

6 Only two Class Members objected to the amount of Class Counsel's fee request: David  
7 Hsu and Eric Veach.<sup>1</sup> (Jue Supp. Decl., Dkt. 1089, Exs. C and L-M.)

8 Mr. Hsu says only that the "attorneys receive too much of the settlement." (Jue Supp.  
9 Decl., Dkt. 1089, Ex. C.) He provides no rationale for his position. He does not acknowledge  
10 that Class Counsel have an equitable right to be compensated for their efforts in creating the  
11 Settlement's common fund of \$415 million. *Staton*, 327 F.3d at 967. He does not recognize that  
12 the appropriate way to compensate Class Counsel is the percentage-of-the-fund method where, as  
13 here, contingency fee litigation has produced a common fund. *See Blum*, 465 U.S. at 900 n.16  
14 (under the common fund doctrine, "a reasonable fee is based on a percentage of the fund  
15 bestowed on the class"); *Vizcaino*, 290 F.3d at 1047-48 (the benchmark fee award in common  
16 fund cases is 25 percent of the recovery obtained, and rejecting the "increase-decrease rule"  
17 whereby the fee percentage decreases as the amount of the common fund increases); *Six Mexican*  
18 *Workers*, 904 F.2d at 1311 (common fund fee is generally "calculated as a percentage of the  
19 recovery"); *Johnson*, 886 F.2d at 272-73 (requiring district court to apply percentage-of-the-fund  
20 method, and requiring that any departure from the 25 percent benchmark "be accompanied by a  
21 reasonable explanation of why the benchmark is unreasonable under the circumstances").

---

22  
23 <sup>1</sup> That only two Class Members out of approximately 64,446 object to the amount of attorneys'  
24 fees requested further supports a conclusion that the request is reasonable. *See Gunter v.*  
25 *Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000) (considering "the presence or  
26 absence of substantial objections by members of the class to the settlement terms and/or fees  
27 requested by counsel" as a factor in approving a settlement); *In re Ins. Brokerage Antitrust Litig.*,  
28 282 F.R.D. 92, 121 (D.N.J. 2012) ("The absence of substantial objections by Settlement Class  
members to the fees requested by Class Counsel strongly supports approval."); *Milliron v. T-*  
*Mobile USA, Inc.*, Case No. 8-4149-JLL, 2009 U.S. Dist. LEXIS 101201, at \*30 (D.N.J. Sept. 10,  
2009) (there "is strong evidence that the requested fee is reasonable" where "[o]nly five Class  
Members lodged objections to the amount of attorneys' fees requested").

1 Mr. Hsu does not consider that application of the Ninth Circuit's benchmark of 25 percent would  
 2 result in a fee award to Class Counsel of \$103,750,000, nor does he consider that Class Counsel's  
 3 request for \$81,125,000 is substantially less than the benchmark amount.

4 Mr. Hsu does not examine any of the considerations relevant to determining whether a  
 5 further downward departure from the Ninth Circuit's 25 percent benchmark is appropriate, such  
 6 as the result achieved, the risks of contingency representation, the complexities of the case and  
 7 skill and effort required of counsel, awards in similar cases; and whether counsel devoted  
 8 substantial time requiring counsel to forgo other work. *Vizcaino*, 290 F.3d at 1048-50. As Class  
 9 Counsel previously explained, consideration of these factors here confirms that a benchmark fee  
 10 of 25 percent would be appropriate, or indeed that an upward departure from 25 percent would be  
 11 well-supported. (Dkt. 1075 at 16-19.) The Court should overrule Mr. Hsu's objection.

12 Dr. Veach argues that Class Counsel's fee request of approximately 19.5 percent of the  
 13 common fund of \$415 million is unreasonable, and suggests that the Court award less than half  
 14 this amount: only about 9.6 percent of the common fund. (Jue Supp. Decl., Dkt. 1089, Ex. L at 2-  
 15 4 and Ex. M.) Dr. Veach's first argument is that a request of 19.5 percent of the common fund is  
 16 unreasonable when compared to the 25 percent of the common fund Class Counsel received in  
 17 connection with the previously-approved settlements of \$20 million with Intuit, Inc., Lucasfilm  
 18 Ltd., and Pixar. (*Id.*, Ex. L at 2-3.) It seems that this is a misunderstanding of the ratios across  
 19 settlements. In fact, on a pro-rata basis, the recovery achieved here for the Class is greater and  
 20 the fee requested here is substantially *less* than in the previous settlements totaling \$20 million.  
 21 While the \$415 million Settlement is about 21 times the size of the earlier settlements of \$20  
 22 million, the average net per Class Member recovery will be over 29 times larger (approximately  
 23 \$5,071.53 compared with approximately \$173.73).<sup>2</sup> Class Counsel seek approximately 19.5  
 24 percent of the common fund here, rather than the benchmark 25 percent that the Court awarded

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25  
 26 <sup>2</sup> This is due from both the lower percentage Class Counsel sought as fees and the smaller amount  
 27 of unreimbursed costs (on both an absolute and proportional basis). While about 18.5 percent of  
 28 the earlier settlements went to reimburse costs (\$3,699,844.31 of the \$20 million common fund),  
 here about 0.3 percent of the Settlement would be used to reimburse costs (\$1,200,000 of the  
 \$415 million common fund).



1 previously (Dkt. 916 at 1-2). Thus, on a proportional basis, Class Counsel would receive  
 2 substantially less, while Class Members would receive substantially more. Dr. Veach also argues  
 3 that the Court should consider fees paid to Class Counsel in the previous Settlements. (Jue Supp.  
 4 Decl., Dkt. 1089, Ex. M at 1-2.) But this would make almost no difference to the percentage  
 5 requested (it would increase the percentage from about 19.5 to about 19.8<sup>3</sup>), and accordingly is  
 6 not material to the analysis.<sup>4</sup>

7 Dr. Veach criticizes what he contends would be the effective hourly rate resulting from  
 8 the requested fees, and asks the Court to reduce Class Counsel's fees in light of what he views to  
 9 be an appropriate multiplier. (Jue Supp. Decl., Dkt. 1089, Ex. M at 2-3.) Dr. Veach  
 10 misunderstands the purpose of a lodestar cross-check, however, where the critical measure is  
 11 what was achieved for the Class in a case taken purely on contingency. "The lodestar method is  
 12 merely a cross-check on the reasonableness of a percentage figure, and it is widely recognized  
 13 that the lodestar method creates incentives for counsel to expend more hours than may be  
 14 necessary on litigating a case so as to recover a reasonable fee[.]" *Vizcaino*, 290 F.3d at 1050 n.5.  
 15 (See also Fitzpatrick Decl., ¶¶ 11 and 21 n.4.) Dr. Veach's calculation of the effective hourly rate  
 16 is also incorrect. For instance, Dr. Veach contends that the fee request equates to \$3,055 per  
 17 hour. (Jue Supp. Decl., Dkt. 1089, Ex. M at 2.) In fact, even when comparing to the partial  
 18 cross-check provided by Class Counsel (Dkt. 1075 at 20), the effective hourly rate (incorporating  
 19 the multiplier) would be \$2,877.62.<sup>5</sup> The resulting partial multiplier of 5.68 is justified under the

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21 <sup>3</sup> Compare (\$81,125,000 / \$415,000,000 = about 19.5 percent) with (\$86,125,000 / \$435,000,000  
 22 = about 19.8 percent). Although not required, a further calculation that incorporates the prior fee  
 23 paid would only increase the total multiplier from 5.68 to 6.03. Compare (\$81,125,000 /  
 24 \$14,279,278.50 = about 5.68) with (\$86,125,000 / \$14,279,278.50 = about 6.03). Of course, any  
 25 multiplier here would be less if the Court includes the separately-submitted JSLF time. (Dkt.  
 26 Nos. 1072, 1073, and 1085.)

27 <sup>4</sup> District courts examine the particular common fund at issue when assessing a fee request,  
 28 including cases in which class counsel make a series of fee requests regarding different common  
 funds generated by separate settlement agreements. See, e.g., *In re TFT-LCD (Flat Panel)*  
*Antitrust Litig.*, Case No. 7-md-1827-SI, Dkt. 7504 (N.D. Cal. Jan. 14, 2013) (granting attorney's  
 fees of 30% of \$68,000,000 common fund, ); *id.*, Dkt. 4436 (granting attorney's fees of 30% of  
 separate \$405,022,242 common fund in same case).

<sup>5</sup> Total fee request (\$81,125,000) / Total hours reported by LCHB, B&M, and G&E (28,191.70) =

1 circumstances here. *See Buccellato*, 2011 WL 3348055, at \*2 (collecting cases, including three  
 2 with total multipliers in excess of the partial multiplier here); *Beckman v. KeyBank, N.A.*, 293  
 3 F.R.D. 467, 481 (S.D.N.Y. 2013) (“Courts regularly award lodestar multipliers of up to eight  
 4 times the lodestar, and in some cases, even higher multipliers.”). (*See also* Dkt. 1075 at 21-22  
 5 (collecting cases); Fitzpatrick Decl., Dkt. 1079 at ¶ 22 (same).) Reducing Class Counsel’s fees  
 6 because of their lodestar would have the perverse effect of punishing Class Counsel for efficiently  
 7 prosecuting the action. *Vizcaino*, 290 F.3d at 1050 n.5. (*See also* Fitzpatrick Decl., Dkt. 1079 at  
 8 ¶¶ 8-11.) It also ignores the purpose of percentage-of-the-fund recoveries, especially in such  
 9 costly, uncertain, and difficult litigation.

10 Dr. Veach also argues that the percentage-of-the-fund method is inappropriate when  
 11 common funds are “large,” relying on *WPPSS*, 19 F.3d 1291. (Jue Supp. Decl., Dkt. 1089, Ex. L  
 12 at 3-4.) Respectfully, Dr. Veach misreads the case. *WPPSS* only reaffirmed the rule in the Ninth  
 13 Circuit that district courts have discretion to apply either the lodestar/multiplier approach or the  
 14 percentage-of-the-fund method, depending on the circumstances of each case.<sup>6</sup> *Id.* at 1295-96.  
 15 The lodestar/multiplier approach was appropriate in that case (involving a common fund of nearly  
 16 \$700 million) in large part because class counsel themselves based their fee request on their  
 17 lodestar enhanced by a blended multiplier. *Id.* at 1297-98. Class counsel only referenced a  
 18 percentage as a cross-check on their lodestar/multiplier approach. *Id.* Here, by contrast, Class  
 19 Counsel base their fee request on the Ninth Circuit benchmark of 25 percent of the previously-  
 20 rejected settlement of \$324.5 million. Class Counsel provided their lodestar as a cross-check on  
 21 the requested percentage.

22 In addition, the Ninth Circuit has since clarified that *WPPSS* did not hold that the fee  
 23 award percentage should decrease as the size of the common fund increases, and has reaffirmed  
 24 that the 25 percent benchmark rate is the starting point for the analysis. *Vizcaino*, 290 F.3d at

25 \$2,877.62. This hourly rate (incorporating a multiplier) would be less if the Court includes the  
 26 JSLF time.

27 <sup>6</sup> In addition, Dr. Veach does not mention that *WPPSS* vacated the district court’s fee award,  
 28 holding that the district court abused its discretion in denying a risk multiplier. 19 F.3d at 1299-  
 1302.

1 1047-48 (rejecting the so-called “increase-decrease rule,” and affirming a fee award of 28 percent  
2 of the common fund). The size of the common fund is a circumstance to be considered, along  
3 with other factors such as the result achieved, the risks to class counsel in contingency  
4 representation, market rates for contingency representation, fee awards out of common funds of  
5 comparable size, and the amount of work and costs class counsel provided on a contingent basis  
6 on behalf of the class to create the common fund. *Id.* at 1047-50. In *Vizcaino* the Ninth Circuit  
7 overruled objectors who simply advocated a lower percentage—without reference to the  
8 particulars of the case—because this approach is arbitrary: “Selection of the benchmark or any  
9 other rate must be supported by findings that take into account all of the circumstances of the  
10 case,” and arbitrarily seeking a lower fee amount “flies in the face of this reasoning.” *Id.* As  
11 Class Counsel have previously explained, these factors all weigh strongly in favor of applying at  
12 least the 25 percent benchmark rate, and certainly support Class Counsel’s request of  
13 approximately 19.5 percent of the common fund. (Dkt. 1075 at 14-19.)

14 The requested rate is well within Ninth Circuit practice, with the vast majority of fee  
15 awards being between 25-35 percent of the fund (*see* Decl. of Brian T. Fitzpatrick, Dkt. 1079, ¶  
16 19), and approximately 80 percent of fee awards constituting over 20% of the fund (*id.*, at ¶ 20).  
17 In cases involving similarly-sized common fund settlements, the median award was 19.5 percent,  
18 essentially Class Counsel’s request here. (*Id.*, at ¶ 21.) *See Vizcaino*, 290 F.3d at 1050 (“to the  
19 extent that a market analogy is on point, in most cases it may be more appropriate to examine  
20 lawyers’ reasonable expectations, which are based on the circumstances of the case and the range  
21 of fee awards out of common funds of comparable size.”).

22 Dr. Veach further contends that fees to Class Counsel and fees to counsel for Mr. Devine  
23 should be considered together, and that the additional \$90.5 million in this Settlement should go  
24 entirely to Class Members. (Jue Supp. Decl., Dkt. 1089, Ex. M at 1-2.) But Class Counsel’s fee  
25 request locks-in Class Counsel’s previous request of 25 percent of the previous settlement of  
26 \$324.5 million. Class Counsel are not seeking another penny in compensation over what Class  
27 Counsel sought in connection with the earlier settlement, despite the substantial additional work  
28 Class Counsel contributed to make the larger settlement possible. (*See* Dkt. 1075 at 11-12.)

1 Mr. Devine's counsel played no role in the creation of the earlier \$324.5 million common fund,  
 2 and Mr. Devine's counsel properly acknowledge that they have no claim to any portion of it.<sup>7</sup>  
 3 (Dkt. 1068.) Class Counsel and Mr. Devine's counsel took very different risks, made  
 4 substantially different investments, and made significantly different contributions to the  
 5 prosecution of the action. Mr. Devine can speak for his own contribution, but the Court should  
 6 rule on the requests separately, and should conduct a separate analysis for each.

7 Finally, Dr. Veach argues that cutting Class Counsel's fee request by more than half  
 8 would "not create a disincentive to pursue similar actions." (Jue Supp. Decl., Dkt. 1089, Ex. M at  
 9 3.) He is mistaken. Here, after the United States Department of Justice announced its findings  
 10 regarding Defendants' alleged violations of the Sherman Act, no firm other than those in this case  
 11 filed a civil action. This was true despite a reasonable expectation of 25 percent of any common  
 12 fund recovery. Arbitrarily limiting Class Counsel's compensation to less than 10 percent of the  
 13 common fund for a case they alone investigated, prosecuted, funded, and resolved, and at the  
 14 expense of taking on different work, would discourage complex and risky private antitrust actions  
 15 like this one, which serve "the high purpose of enforcing the antitrust laws," (Order Granting  
 16 Plaintiffs' Supp. Mot. for Class Certification, Dkt. 531 at 13, quoting *Zenith Radio Corp. v.*  
 17 *Hazeltine Research, Inc.*, 395 U. S. 100, 130-31 (1969)), and "provide a significant supplement to  
 18 the limited resources available to the Department of Justice for enforcing the antitrust laws and  
 19 deterring violations," (*id.*, quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979)).

20 Class action lawyering is a tough business. It is enormously expensive and risky to go  
 21 toe-to-toe with the most well-financed companies in the world, relying on some of the most  
 22 difficult caselaw for plaintiffs, requiring ever more rigorous and costly evidentiary proof at every  
 23 stage of litigation. It is assumed, erroneously, by objectors that every class action lawyer wins  
 24 every case, and each fee paid above lodestar is but a windfall for lawyers catching nothing but  
 25 paydays. That is not how contingent litigation works. A contingent fee recognizes the risk that  
 26 there are cases that do not get paid, even while overheads and payrolls are never relenting. "In

27 <sup>7</sup> Instead, Mr. Devine's counsel seeks a fee award of 5 percent of the additional \$90.5 million.  
 28 (Dkt. 1068.)

1 common fund cases, attorneys whose compensation depends on their winning the case must make  
 2 up in compensation in the cases they win for the lack of compensation in the cases they lose.”  
 3 *Vizcaino*, 290 F.3d at 1051 (internal edit and quotation omitted). In order to stay in business,  
 4 lawyers must consider the risk that they will not only receive no pay for years of work, but that  
 5 they will also be out of pocket millions in hard costs and employee salaries for their efforts. If the  
 6 trend is to reimburse class action contingent lawyers as if the result achieved was just like any in  
 7 a guaranteed hourly billing practice, the risks are far too high to sustain the necessary investment.  
 8 Lawyers will tend to move toward safer opportunities and reduced expenditures. The important  
 9 public benefits of contingent fee class litigation—undertaking potentially meritorious but risky  
 10 cases for those who do not possess resources to fund them and private enforcement of antitrust  
 11 and other important laws—would be undercut. Many cases like this one might never be filed.

12 Further, awarding lower fee percentages as the size of the settlement increases creates a  
 13 disincentive to Class Counsel to push for the largest possible settlement and misaligns the  
 14 interests of Class Counsel with the interests of the Class. (*See Fitzpatrick Decl.*, Dkt. 1079, ¶ 21  
 15 n.4.) *See also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 122 (2d Cir. 2005)  
 16 (percentage method “directly aligns the interests of the class and its counsel”) (citation omitted).  
 17 The percentage method also encourages efficiency and discourages waste.<sup>8</sup>

18 Class Counsel’s fee request is reasonable and well below the Ninth Circuit’s benchmark  
 19 fee of 25 percent. The Court should overrule Mr. Hsu’s and Dr. Veach’s objections.

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20 <sup>8</sup> Similarly, Dr. Veach objects that the additional fees sought are a “windfall” because Class  
 21 Counsel has already received \$5 million in fees. (Jue Supp. Dec., Dkt. 1089, Ex. L at 2 and Ex. M  
 22 at 1-2.) It is routine in antitrust cases with multiple defendants—as here—that there are several  
 23 settlements subject to separate approval procedures. Total work provided by Class Counsel from  
 24 the inception of the case make each settlement possible, and thus it would be incorrect to base fee  
 25 awards in subsequent settlements only on work done after reaching earlier settlements. *See In re*  
 26 *Southwestern Milk Antitr. Litig.*, 2013 U.S. Dist. LEXIS 70167, \*26-27 (E.D. Tenn. 2013) (“[I]f  
 27 an award of fees for a successive settlement were limited and calculated only on the basis of time  
 28 and expenses incurred since the preceding settlement, counsel would have little or no incentive to  
 vigorously or efficiently pursue litigation or settlement of claims with non-settling defendants, or  
 to seek non-monetary relief, even though the remaining defendants might be equally as culpable  
 or have greater culpability.”); *Lobatz v. U.S. West Cellular of California, Inc.*, 222 F.3d 1142,  
 1149 (9th Cir. 2000) (affirming that counsel should be awarded fees based on work on entire  
 litigation, not time since the first settlement).

1           **C.     The Objections Regarding Notice of Class Counsel’s Fee Request Should Be**  
 2           **Overruled**

3           Dr. Veach and Mr. Zavislak contend that additional notice procedures should have been  
 4 implemented to apprise Class members of Class Counsel’s fee requests and supporting papers.  
 5 (Jue Supp. Decl., Dkt. 1089, Ex. L at 1-2 and Ex. N at 2-3 and 5-6.) They rely on *In re Mercury*  
 6 *Interactive Corp. Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010), which held that class counsel’s fee  
 7 motion must be filed before the Class’s objection deadline. But this is exactly what occurred  
 8 here. *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-md-1827-SI, 2011 U.S. Dist.  
 9 LEXIS 154288, at \*4-6 (N.D. Cal. Dec. 27, 2011) (overruling objection that fee requests should  
 10 have been posted to the case-specific website: “Nothing in the *Mercury Interactive* decision  
 11 requires a motion for attorneys’ fees to be posted on a class action website.”). *See also In re*  
 12 *Online DVD-Rental Antitr. Litig.*, 779 F.3d 934, 954 (9th Cir. 2015) (notice satisfied Rule 23(h)  
 13 where the notice informed class members that class counsel would be seeking 25 percent of the  
 14 common fund, and the Court set the deadline for filing the motion for fees about two weeks in  
 15 advance of the class member objection deadline).

16           Consistent with *Mercury Interactive* and *Online DVD-Rental*, the Court set a deadline for  
 17 Class Counsel to submit fee requests by May 7, 2015, two weeks before the deadline for Class  
 18 Members to opt-out, object, or provide notice of intent to appear at the final approval hearing.<sup>9</sup>  
 19 (Dkt. 1054 at 11-12.) Class Counsel’s fee requests were available on the public docket, just as all  
 20 other publicly-available documents filed in this case. Class Members had two weeks to examine  
 21 and oppose the requests, satisfying the full-and-fair-opportunity requirement under Federal Rule  
 22 of Civil Procedure 23(h). *See TFT-LCD*, 2011 U.S. Dist. LEXIS 154288, at \*5 (“[I]like all Class  
 23 Members, [objector] has access to the public docket . . . [the objector] therefore cannot  
 24 demonstrate any prejudice by the posting of the Fee Motion on the Court’s public docket alone,  
 25 rather than in conjunction with the class action website.”).

26 \_\_\_\_\_  
 27 <sup>9</sup> The Court’s Order Granting Preliminary Approval (setting the deadline for Class Counsel’s fee  
 28 requests) was also posted to the case-specific website. *See*  
[http://www.hightechemployeeelawsuit.com/media/264422/prelim\\_approval\\_order.pdf](http://www.hightechemployeeelawsuit.com/media/264422/prelim_approval_order.pdf).



1 Mr. Zavislak complains that the Court's electronic PACER system charges access fees.<sup>10</sup>  
 2 (Jue Supp. Decl., Dkt. 1089, Ex. N. at 2, 6.) But Mr. Zavislak ignores that the Court-approved  
 3 Notice (mailed to all Class Members and posted on the case-specific website<sup>11</sup>) included a variety  
 4 of means to ask for assistance. Class Members were notified that they could "call, write, fax, or  
 5 email the Notice Administrator with your questions[.]" (Notice, Dkt. 1086-1, at 12: "How do I  
 6 get more information?") This included a toll-free telephone number. As of June 5, 2015, the  
 7 Notice Administrator had received 56 requests for a copy of the Notice over the phone, by email,  
 8 and by mail. (Jue Decl., Dkt. 1086, ¶ 7.) The Notice Administrator sent a copy of the Notice  
 9 whenever one was requested. (*Id.*) No Class Member asked the Notice Administrator for a copy  
 10 of Class Counsel's fee requests. (Jue Second Supp. Decl., ¶ 2, filed herewith.) Had any Class  
 11 Member requested a copy of Class Counsel's fee requests, the Notice Administrator would have  
 12 provided it. (*Id.*) In addition, the Notice provided contact information for Class Counsel,  
 13 including their mailing addresses, phone numbers, and email addresses. (Dkt. 1086-1 at 8.)  
 14 Hundreds of Class Members contacted Class Counsel with questions. (Harvey Supp. Decl., ¶ 2,  
 15 filed herewith.) None asked for Class Counsel's fee papers. (*Id.*, ¶ 3.) Had any Class Members  
 16 requested a copy, Class Counsel would have provided it. (*Id.*) See *TFT-LCD*, 2011 U.S. Dist.  
 17 LEXIS 154288, at \*5 ("Class Members had multiple avenues in addition to the Court's docket  
 18 and the class action website to obtain information about the proposed settlements and the Fee  
 19 Motion.").

20 Neither Dr. Veach nor Mr. Zavislak requested a copy of Class Counsel's fee request  
 21 before submitting their objection. (Jue Second Supp. Decl., ¶ 2; Harvey Supp. Decl., ¶ 3.) These  
 22 objections were the first (and only) indication Class Counsel or the Notice Administrator had that  
 23 any Class Member had difficulty reviewing Class Counsel's fee requests. (Jue Second Supp.

24 <sup>10</sup> Notably, Mr. Zavislak is a California-licensed attorney who, according to his LinkedIn profile,  
 25 currently works as a lawyer for Google. (See Harvey Supp. Decl., ¶ 8 and Ex. G;  
 26 <http://members.calbar.ca.gov/fal/Member/Detail/271755>.) Presumably if Mr. Zavislak wanted to  
 27 see Class Counsel's filing for free, he could have also sought it from his colleagues in Google's  
 28 legal department, including those defending this case.

<sup>11</sup> See  
[http://www.hightechemployeeelawsuit.com/media/266091/v3\\_htea1\\_notice\\_032714\\_final.pdf](http://www.hightechemployeeelawsuit.com/media/266091/v3_htea1_notice_032714_final.pdf).

Decl., ¶ 2; Harvey Supp. Decl., ¶ 3.) Immediately upon reviewing the objections, Class Counsel emailed their fee requests and supporting declarations directly to Dr. Veach on May 21, 2015 and to Mr. Zavislak (also, in an abundance of caution, to Mr. Hsu) on May 22, 2015. (Harvey Supp. Decl., ¶¶ 5-7, Exs. A, D, and F.) Class Counsel also uploaded the documents to the case-specific website.<sup>12</sup> (Jue Second Supp. Decl., ¶ 3; Harvey Supp. Decl., ¶ 4.) Class Counsel informed Dr. Veach and Mr. Zavislak that Class Counsel would not oppose an extension for them to review and comment on the materials. (Harvey Supp. Decl., ¶¶ 5-7, Exs. A and D.) Dr. Veach accepted Class Counsel's invitation and submitted a supplemental objection on June 1, which Class Counsel included among the timely objections received and do not oppose on the basis that it arrived after the objection deadline. (Jue Supp. Decl., Ex. M.) Mr. Zavislak declined to supplement his comments, even though he received the same invitation. (Harvey Supp. Decl., Ex. E.) Thus, neither Dr. Veach nor Mr. Zavislak can demonstrate any prejudice for failing to review the fee papers prior to the objection deadline. *TFT-LCD*, 2011 U.S. Dist. LEXIS 154288, at \*5.

Dr. Veach's and Mr. Zavislak's objections should be overruled.

**D. The Objections Regarding Defendants' Agreement Not to Comment on or Oppose Class Counsel's Fee Request Should Be Overruled**

Dr. Veach and Mr. Zavislak object to the Settlement Agreement because the Defendants agreed to a so-called "clear sailing" provision: not to comment on or oppose Class Counsel's fee request "so long as the request for fees is no greater than \$81,125,000 (approximately 19.54%) of the \$415 million Settlement Fund." (Dkt. 1033-1 at 28.) (*See* Jue Supp. Decl., Dkt. 1089, Ex. L at 4 and Ex. N at 5.)

However, as the Ninth Circuit has explained, a "clear sailing" provision "does not signal the possibility of collusion" where, as here, Class Counsel's fee will be awarded by the Court from the same common fund as the recovery to the Class. *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 961 n.5 (9th Cir. 2009). Indeed, the settlement achieved here was the product of hard-

<sup>12</sup> *See* <http://www.hightechemployeelawsuit.com/case-documents.aspx>.



fought, adversarial negotiation, supervised and facilitated by the Hon. Layn Phillips, an experienced mediator and former United States District Court Judge. (Dkt. 1087 at 13-16.) Class Counsel did not negotiate fees separate and apart from Class funds, nor did Class Counsel agree that any portion of the \$415 million common fund could revert back to Defendants. *See, e.g., In re Easysaver Rewards Litig.*, 921 F. Supp. 2d 1040, 1054 (S.D. Cal. 2013) (overruling objection to “clear sailing” provision where the settlement was the result of arms-length negotiations, funds for attorney fees were not held separate from class funds, and no settlement funds would revert back to defendants). Given that Defendants have merely agreed not to object to Class Counsel staying within a legal benchmark articulated by the Ninth Circuit, it is hardly a sign that the Defendants gave up something special in trade.

Dr. Veach’s and Mr. Zavislak’s objections should be overruled.

**E. The Objection Asking the Court to Examine the Accuracy of Class Counsel’s Time Records Should Be Overruled**

Dr. Veach objects to time records submitted by Class Counsel “until they have been carefully examined by the Court.” (Jue Supp. Decl., Dkt. 1089, Ex. L at 4.) Class Counsel do not disagree and fully expect that the Court will review the materials the Court ordered be submitted in support of Class Counsel’s fee requests.

**F. The Objection to Providing Named Plaintiffs with Service Awards Should Be Overruled**

Finally, Google’s lawyer, Mr. Zavislak, asks the Court to disallow Class Representative service awards “in their entirety.” (Jue Supp. Decl., Dkt. 1089, Ex. N at 7.) He contends that the requested amounts are excessive, and argues that the fact that Class Counsel seek the same service award for each Class Representative somehow demonstrates improper collusion among the Class Representatives, akin to Defendants’ alleged collusion at issue in this case. Mr. Zavislak’s arguments are without merit.

First, as Class Counsel previously explained, the requested services awards are appropriate to compensate the Class Representatives for the critical services they provided, the substantial risks they incurred during the course of the litigation, and to reward their public

1 service of contributing to the enforcement of the nation's antitrust laws. (Dkt. 1032 at 10-14;  
 2 Dkt. 1075 at 22-25.) No Class Representative was promised any amount of money to serve as a  
 3 Class Representative, or in connection with their approval of this Settlement or any prior  
 4 settlement in this action. (Fichtner Decl., Dkt. 1077, ¶ 4; Hariharan Decl., Dkt. 1076, ¶ 4; Harvey  
 5 Decl., Dkt. 1082, ¶ 7; Stover Decl., Dkt. 1078, ¶ 4.) Their support for the Settlement was based  
 6 on their views, in light of the record and the risks, that the Settlement is in the best interests of the  
 7 Class.<sup>13</sup> (*Id.*)

8 Second, Mr. Zavislak's suggestion of improper collusion among the Class Representatives  
 9 is wrong. Class Counsel worked extensively with all five named Plaintiffs throughout this  
 10 litigation and know well the effort and professional sacrifice they made to bring this result to the  
 11 Class. Upon reviewing their respective contributions, Class Counsel submitted a request on  
 12 behalf of the three Named Plaintiffs (Mr. Fichtner, Mr. Hariharan, and Mr. Stover) they currently  
 13 represent, as well as for the estate of deceased named Plaintiff Brandon Marshall. These requests  
 14 were made in consideration of the applicable caselaw and the supporting evidence. Mr. Devine's  
 15 counsel made a separate request, supported by his counsel's review of his separate contribution.  
 16 That Class Counsel cannot distinguish among the five in terms of contribution does not make the  
 17 requests collusive.

18 Mr. Zavislak's objection should be overruled.

### 19 **III. CONCLUSION**

20 For the aforementioned reasons, Plaintiffs respectfully request that the Court overrule the  
 21 objections and grant Class Counsel's Motion for Attorneys' Fees, Reimbursement of Expenses,  
 22 and Service Awards to the Named Plaintiffs.

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23  
 24 <sup>13</sup> Class Counsel initially requested service awards of \$80,000 for each Class Representative.  
 25 However, if the Court awards the higher amount requested by Plaintiff Michael Devine for  
 26 himself, the other Class Representatives should not be treated less favorably for their similar time,  
 27 risk, attention, and independent judgment. Awarding different amounts when the only difference  
 28 among them is whether any of them rejected the prior settlement would create perverse incentives  
 for future class representatives. (Dkt. 1075 at 23 n.14.) The Court-approved Notice included this  
 request. (Dkt. 1086-1 at 8.)

Respectfully submitted,

Dated: June 29, 2015

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